

6.0 COORDINATION WITH OTHER PROGRAMS, PLANS, AND REGULATORY AUTHORITIES

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6.1 Overview

Two major federal laws guiding the restoration of the injured resources and services are the Oil Pollution Act and the NEPA. The Oil Pollution Act and its regulations provide the basic framework for natural resource damage assessment and restoration. The NEPA sets forth a specific process of impact analysis and public review. In addition, the Trustees must comply with other applicable laws, regulations and policies at the federal, state, tribal, and local levels. The potentially relevant laws, regulations, and policies are set forth below.

In addition to laws and regulations, the Trustees must consider relevant environment or economic programs or plans that are ongoing or planned in or near the affected environment. For example, as previously noted, the restoration projects may be occurring, in part, in an urban park that is subject to comprehensive planning. A number of documents have been and will be produced as a part of that park and City planning process. Additionally, the Creek has been the focus of community-based restoration efforts. The Trustees propose to work with the sponsors of the ongoing restoration projects to ensure that proposed restoration activities for the Incident neither impede nor duplicate such programs or plans. By coordinating restoration with other relevant programs and plans, the Trustees can enhance the overall effort to improve the environment of the Creek.

In initiating this draft RP/EA, the Trustees have elected to combine the restoration plan required under the Oil Pollution Act with the environmental processes required under the NEPA. This will enable the Trustees to implement restoration more rapidly than if these processes had been undertaken sequentially.

6.2 Key Statutes, Regulations and Policies

There are a number of federal, state, tribal, and local statutes, regulations, and policies that govern or are relevant to damage assessment and restoration.

Oil Pollution Act of 1990, 33 U.S.C. §§ 2701, *et seq.*; 15 CFR Part 990

The Oil Pollution Act (OPA) establishes a liability regime for oil spills that injure or are likely to injure natural resources and/or the services that those resources provide to the ecosystem or humans. Federal and state agencies and Indian tribes act as Trustees on behalf of the public to assess the injuries, scale restoration to compensate for those injuries, and implement restoration. Section 1006(e)(1) of OPA (33 U.S.C. § 2706 (e)(1)) requires the President, acting through the Under Secretary of Commerce for Oceans and Atmosphere (NOAA), to promulgate regulations for the assessment of natural resource damages resulting from a discharge or substantial threat of

a discharge of oil. Assessments are intended to provide the basis for restoring, replacing, rehabilitating, and acquiring the equivalent of injured natural resources and services.

This rule provides a framework for conducting sound natural resource damage assessments that achieve restoration. The process emphasizes both public involvement and participation by the RP(s). The Trustees have followed the regulations in this assessment.

National Environmental Policy Act, as amended, 42 U.S.C. §§ 4321, *et seq.*, 40 CFR Parts 1500-1508

Congress enacted the National Environmental Policy Act (NEPA) in 1969 to establish a national policy for the protection of the environment. NEPA applies to federal agency actions that affect the quality of the human environment. NEPA established the Council on Environmental Quality (CEQ) to advise the President and to carry out certain other responsibilities relating to implementation of NEPA by federal agencies. Pursuant to Presidential Executive Order, federal agencies are obligated to comply with the NEPA regulations adopted by the Council on Environmental Quality. These regulations outline the responsibilities of federal agencies under NEPA and provide specific procedures for preparing environmental documentation to comply with NEPA. NEPA requires that an Environmental Assessment (EA) be prepared in order to determine whether the proposed restoration actions will have a significant effect on the quality of the human environment.

Generally, when it is uncertain whether an action will have a significant effect, federal agencies will begin the NEPA planning process by preparing an Environmental Assessment. The Environmental Assessment may undergo a public review and comment period. Federal agencies may then review the comments and make a determination. Depending on whether an impact is considered significant, an environmental impact statement or a finding of no significance (FONSI) will be issued.

The Trustees have integrated this draft RP/EA with the NEPA process to comply, in part, with those requirements. This integrated process allows the Trustees to meet the public involvement requirements of the Oil Pollution Act and NEPA concurrently. This draft RP/EA is intended to accomplish partial NEPA compliance by:

- Summarizing the current environmental setting;
- Describing the purpose and need for restoration action;
- Identifying alternative actions;
- Assessing the preferred actions' environmental consequences; and
- Summarizing opportunities for public participation in the decision process.

Project-specific NEPA documents may need to be prepared for those proposed restoration projects not already analyzed in an environment assessment or environmental impact statement. There are similar state requirements (Ch. 43.21C RCW) that will need to be met as part of the regulatory evaluation of some of the restoration projects.

Clean Water Act (Federal Water Pollution Control Act), 33 U.S.C. §§ 1251, *et seq.*

The Clean Water Act (CWA) is the principal law governing pollution control and water quality of the nation's waterways. Section 404 of the law authorizes a permit program for the disposal of dredged or fill material into navigable waters. The U.S. Army Corps of Engineers administers the program. In general, restoration projects that move significant amounts of material into or out of waters or wetlands (e.g., hydrologic restoration of marshes) require Section 404 permits. Under Section 401 of the CWA, restoration projects that involve discharge or fill to wetlands or navigable waters must obtain certification of compliance with state water quality standards (section 401). Generally, restoration projects with minor wetland impacts (i.e., a project covered by a U.S. Army Corps of Engineers general permit) do not require Section 401 certification, while projects with potentially large or cumulative impacts do. The Trustees anticipate that the Salmon Park and Cemetery Creek restoration projects will require Section 404 permits.

Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), 16 U.S.C. §§ 1801, *et seq.*, 50 CFR Part 600

In 1996, the Act was reauthorized and changed by amendments to emphasize a new standard by requiring that fisheries be managed at maximum sustainable levels and that new approaches be taken in habitat conservation. This habitat is called essential fish habitat (EFH), defined broadly to include "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity" (62 Fed. Reg. 66551, § 600.10 Definitions). The MSFCMA requires consultation for all federal agency actions that may adversely affect essential fish habitat. Under Section 305(b)(4) of the Act, the National Marine Fisheries Service is required to provide advisory essential fish habitat conservation and enhancement recommendations to federal and state agencies for actions that adversely affect essential fish habitat. These essential fish habitat consultations will be combined with existing interagency consultations and environmental review procedures that may be required under other statutes. In the situation where federal agency actions are subject to Endangered Species Act Section 7 consultations, such consultations will be combined to accommodate the substantive requirements of both the Endangered Species Act and essential fish habitat. The Trustees will consult with NMFS prior to implementation of any restoration project occurring in an area covered by the Pacific Fishery Management Council.

Coastal Zone Management Act, 16 U.S.C. §§ 1451, *et seq.*, 15 CFR Part 923

The goal of the Coastal Zone Management Act (CZMA) is to preserve, protect, develop, and, where possible, restore and enhance the nation's coastal resources. The federal government provides grants to states with federally approved coastal management programs. The State of Washington has a federally approved program. Section 1456 of the CZMA requires that any

federal action inside or outside of the coastal zone that affects any land or water use or natural resources of the coastal zone shall be consistent, to the maximum extent practicable, with the enforceable policies of approved state management programs. It states that no federal license or permit may be granted without giving the state the opportunity to concur that the project is consistent with the state's coastal policies. The regulations outline the consistency procedures.

The Trustees do not believe that any of the proposed projects will adversely affect the state's coastal zone, but will consult the CZMA to ensure that any applicable projects are consistent to the maximum extent practicable with the enforceable policies of the state coastal program.

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601, *et seq.*

The Act provides the basic legal framework for cleanup and restoration of the nation's hazardous-substances sites. Generally, parties responsible for contamination of sites and the current owners or operators of contaminated sites are liable for the cost of cleanup and restoration. CERCLA establishes a hazard ranking system for assessing the nation's contaminated sites with the most contaminated sites being placed on the National Priorities List (NPL). To the extent that restoration projects are proposed for areas containing hazardous substances, the Trustees will avoid exacerbating any potential risk posed by such substances and will undertake no actions which might constitute "arrangement for disposal of hazardous substances." At this time, the Trustees are not aware of any potential hazardous-substance problem associated with the areas where proposed restoration projects will occur.

Model Toxics Control Act (MTCA), Ch. 70.105D RCW (1989) and Ch. 173-340 WAC (1992). MTCA, Washington's toxic cleanup law, mandates that site cleanups protect the state's citizens and the environment. The regulations established cleanup standards which provide a uniform, statewide approach to cleanup that can be applied on a site-by-site basis; and requirements for cleanup actions, which involve evaluating the best methodology to achieve the cleanup standards at a site. MTCA is the state equivalent of the Federal Superfund program and is managed by WDOE. WDOE is a Trustee for this site so MTCA compliance will be inherent in the Trustee decisionmaking process.

Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.*, 50 CFR Parts 17, 222, 224

The Act directs all federal agencies to conserve endangered and threatened species and their habitats and encourages such agencies to utilize their authority to further these purposes. Under the ESA, NOAA, through NMFS, and the Department of the Interior, through the USFWS, publish lists of endangered and threatened species. Section 7 of the Act requires that federal agencies consult with these agencies to minimize the effects of federal actions on endangered and threatened species. The Trustees have determined that several of the preferred ecological alternatives will benefit some endangered species, notably chinook salmon. Certain projects that require significant construction activity may disturb endangered species, although the regulatory permits and consultation conditions typically set forth a number of operating measures designed

to prevent or mitigate any such disturbances. Section 7 consultations will be conducted as part of the permitting process for the in-water projects, such as Salmon Park, Cemetery Creek, and the park improvements.

Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661, *et seq.*

The Fish and Wildlife Coordination Act (FWCA) requires that federal agencies consult with the USFWS, NMFS, and state wildlife agencies for activities that affect, control, or modify waters of any stream or bodies of water, in order to minimize the adverse impacts of such actions on fish and wildlife resources and habitat. This consultation is generally incorporated into the process of complying with Section 404 of the Clean Water Act, the NEPA or other federal permit, license, or review requirements.

In the case of restoration actions for this Incident, the fact that the three consulting agencies for the Fish and Wildlife Coordination Act (i.e., USFWS, NMFS and WDFW) are represented by the Trustees means that FWCA compliance will be inherent in the Trustee decision-making process.

Rivers and Harbors Act, 33 U.S.C. §§ 401, *et seq.*

The Rivers and Harbors Act regulates development and use of the nation's navigable waterways. Section 10 of the Act prohibits unauthorized obstruction or alteration of navigable waters and vests the U.S. Army Corps of Engineers with authority to regulate discharges of fill and other materials into such waters. Restoration actions that require Section 404 Clean Water Act permits are likely also to require permits under Section 10 of the Rivers and Harbors Act; however, a single permit usually serves for both. Therefore, the Trustees can ensure compliance with the Rivers and Harbors Act through the same mechanism.

Executive Order 12898: Environmental Justice, as amended

On February 11, 1994, President Clinton issued Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. This Executive Order requires each federal agency to identify and address, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations. The Environmental Protection Agency and the Council on Environmental Quality have emphasized the importance of incorporating environmental justice review in the analyses conducted by federal agencies under the NEPA and of developing mitigation measures that avoid disproportionate environmental effects on minority and low-income populations.

The Lummi Nation and Nooksack Tribe constitute distinct, separate communities of Native Americans who rely on Treaty-reserved fish and shellfish resources for subsistence, economic, and spiritual purposes. Other members of low-income communities may rely on fishery resources for subsistence purposes. The Trustees have not identified any disproportionate, adverse impacts on human health or environmental effects on implementation of the Preferred

Alternative on Native Americans or other minority or low-income populations and believe that the projects will be beneficial to these communities. The Tribes are Trustees for this Incident and their representation will be inherent in the Trustee decisionmaking process.

Executive Order 11988: Construction in Floodplains

This 1977 Executive Order directs federal agencies to avoid to the extent possible the long- and short-term adverse impacts associated with the occupancy and modification of floodplains and to avoid direct or indirect support of development in floodplains wherever there is a practicable alternative. Each agency is responsible for evaluating the potential effects of any action it may take in a floodplain.

Before taking an action, the federal agency must determine whether the proposed action will occur in a floodplain. For major federal actions significantly affecting the quality of the human environment, the evaluation will be included in the agency's NEPA compliance document(s). The agency must consider alternatives to avoid adverse effects and incompatible development in floodplains. If the only practicable alternative requires siting in a floodplain, the agency must: 1) design or modify the action to minimize potential harm; and 2) prepare and circulate a notice containing an explanation of why the action is proposed to be located in the floodplain. The Trustees will take the appropriate steps to comply with EO 11988 should any of the preferred alternatives be located in the floodplain.

6.3 Other Potentially Applicable Laws and Regulations

This section lists other laws that potentially affect the restoration activities. The statutes or their implementing regulations may require permits from federal or state permitting authorities. The permitting process also may require an evaluation of statutes other than those listed below.

Archaeological Resources Protection Act, 16 U.S.C. §§ 470, *et seq.*

Clean Air Act, 42 U.S.C. §§ 7401, *et seq.*

Marine Mammal Protection Act, 16 U.S.C. §§ 1361, *et seq.*

Migratory Bird Treaty Act, 16 U.S.C. §§ 703, *et seq.*

National Historic Preservation Act, 16 U.S.C. §§ 470, *et seq.*

Treaty of Point Elliott, 1855. S. Doc. 319, 58-2, vol. 2:43.

6.4 Cedar and Salmon Cultural Framework

In addition to the potentially applicable federal, state, and local laws and regulations, the Trustees have also considered Tribal policies, priorities, and guiding principles. For many

centuries, the native people of the Pacific Northwest based their economy, culture, and religion on salmon fishing. The Western red cedar tree also was also critical to the tribes for shelter, clothing, transportation, and art. The Trustees have attempted to address this cultural framework through salmon restoration and planting of cedar trees and other native vegetation along the Creek.

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8.0 REFERENCES

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